

**United States Government**  
**National Labor Relations Board**  
**OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: July 18, 1994

TO : Richard L. Ahearn, Regional Director  
Region 3

FROM : Robert E. Allen, Associate General Counsel  
Division of Advice 177-2428-7500  
362-6766-1050

SUBJECT: Bell Aerospace Textron 530-4080-5066-5000  
Case 3-CA-18524 530-4090-5000  
530-8020-1200

This Section 8(a)(5) case was submitted for advice as to whether the Employer unlawfully withdrew recognition during the term of a contract covering bargaining units which have less than two employees currently working and laid-off employees with contractual recall rights.

The Union was separately certified as the collective bargaining representative in four units at the Employer's Wheatfield, N.Y. facility.<sup>1</sup> The parties have negotiated successive single collective-bargaining agreements covering these four units as well as units represented by two sister locals of the Union. In 1991, a restructuring of the Employer's operations resulted in layoffs of Union-represented employees and, on July 18, the Employer and the Union signed an agreement which guaranteed the retention of recall rights and provided severance pay and other benefits to laid-off employees. The current collective-bargaining agreement, executed in 1992, continued to cover these four units even though no employees were working in the buyers and estimators units and only one PC/MC employee was working.<sup>2</sup>

At an April 7, 1994 pre-arbitration grievance meeting regarding the layoff of the last PETA employee, the Union rejected the Employer's suggestion to merge the four units. On April 8, the Employer withdrew recognition of the Union in each of the units because, in its view, one-person units are inappropriate under the Act.

The presidents of the Union's two sister locals have testified that high-level Employer officials stated that business was likely to increase in 1995 and, if the Employer were successful in obtaining certain work it was seeking,

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<sup>1</sup> These include two production units (PC/MC and PETA), a buyers unit and an estimators unit.

<sup>2</sup> There were two employees in the PETA unit; one was laid off in December 1993.

large numbers of production employees would be recalled at Wheatfield. An Employer official testified that in light of current budgetary constraints on the Department of Defense, it is unlikely that the work being sought will actually materialize in the foreseeable future. He further testified that even if laid-off production employees needed to be recalled, buyers and estimators would not be because the work of those units is now being performed at the Employer's Massachusetts facility pursuant to the 1991 restructuring.

We conclude that complaint should issue, absent settlement, alleging only that the Employer unlawfully withdrew recognition in the PC/MC and PETA units; similar allegations regarding the buyers and estimators units should be dismissed, absent withdrawal.

The Board recognizes that employers may withdraw recognition during the term of a contract if the bargaining unit is a stable one-person unit.<sup>3</sup> A determination as to whether the units herein were one-person (or "no-person") units as of the April 8 withdrawal of recognition turns on whether the laid-off employees in these units had a reasonable expectancy of recall in the near future based on objective factors, including "the past experience of the employer, the employer's future plans, the circumstances of the layoff, and what the employee was told about the likelihood of recall."<sup>4</sup> Contract recall rights are one factor in making such a determination,<sup>5</sup> and when "other factors involved do not support a laid-off employee's having a reasonable expectancy of recall, verbal statements indicating possible recall will not overcome the totality of the evidence to the contrary."<sup>6</sup>

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<sup>3</sup> See McDaniel Electric, 313 NLRB No. 11, slip op. at 2 and cases cited (November 23, 1993).

<sup>4</sup> S & G Concrete Co., 274 NLRB 895, 896 (1985).

<sup>5</sup> See Madison Industries, 311 NLRB 865, 867 (1993) (no reasonable expectancy of recall even though employer told employee it would rehire him if it gained new business, since obtaining contract on which it bid was merely speculative; it meanwhile had not bid on other jobs; and, most importantly, employee must have been aware of the contractual recall policy pursuant to which, at the time of the election, he had lost his seniority for recall purposes).

<sup>6</sup> S & G Concrete, supra, 274 NLRB at 897 (footnote omitted) (no reasonable expectancy of recall where employer had

Although the monetary provisions of the 1991 agreement recognizing the need for layoffs may indicate that the parties anticipated the layoffs would be long-term, the retention of recall rights and the Employer's execution of the current collective-bargaining agreement covering employees in the four units indicate that the layoffs would not be permanent. Thus, the latter conduct, which otherwise would be meaningless, suggests that some recall of employees may have been anticipated. Moreover, the testimony of the presidents of the Union's sister locals regarding the Employer's expectation that large numbers of production employees may well be recalled, as well as the Employer's testimony that one PETA employee and one PC/MC employee would likely be recalled if work increased, support our conclusion that sufficient numbers of PETA and PC/MC employees have a reasonable expectation of recall and, therefore, these units contained more than one person on April 8.<sup>7</sup> Accordingly, the Employer's withdrawal of recognition in these two units was unlawful.

However, other than the Employer's execution of the current contract in 1992, there is no evidence to rebut its testimony that even if production work increased, no buyers or estimators would be recalled at Wheatfield because all such work has been relocated to Massachusetts pursuant to the 1991 restructuring. We conclude that employees in the buyers and estimators units have no reasonable expectancy of recall and, therefore, the Employer was privileged to withdraw recognition as to those units.

R.E.A.

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neither a seasonal pattern of layoffs and recalls nor a policy or practice of recalling laid-off employees; one laid-off employee had been hired solely to work on a special project which ended; and the other laid-off employee was aware that the employer had decided to remove permanently from its operations at least two trucks, including the one assigned to the laid-off employee).

<sup>7</sup> Since one PC/MC employee was working on April 8, the recall of one additional PC/MC clerk would result in at least a two-person unit. Additionally, the Region has determined that the Employer's statements regarding the anticipated increase in work indicate that a recall of PETA employees is likely and, contrary to the Employer's statements, would not assume that it would involve only one rather than two such employees.